UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

THOMAS EATON, SR., and WANDA EATON, husband and wife, the surviving parents of THOMAS W. EATON, JR., Plaintiffs,	)	
vs.	)	IP 01-5377-C-B/S
THE BRIDGESTONE CORPORATION, a foreign corporation, BRIDGESTONE/FIRESTONE, INC., an Ohio Corporation formerly known as the FIRESTONE TIRE & RUBBER CORPORATION, INC., and CHARLIE CASE TIRE CO., an Arizona Corporation, et al., Defendants.	)	

ENTRY ON PLAINTIFFS' MOTION TO REMAND

This matter comes before the Court on Plaintiffs' Motion for Remand. Defendants Bridgestone/Firestone Inc. ("Firestone") and Charlie Case Tire Company ("Case") contend that remand is inappropriate because Plaintiffs, Arizona residents, have fraudulently joined Case, a nondiverse defendant, in order to defeat federal jurisdiction. For the reasons set forth below, we GRANT Plaintiffs' Motion to Remand and hereby remand this cause to the Arizona Superior Court of Maricopa County.

Factual Background

On March 29, 1996, Plaintiffs' son, Thomas Eaton Jr., suffered fatal injuries in a rollover accident while driving a van to a community college baseball team game. Plaintiffs' Motion to Remand at 3. One of the passengers in the vehicle also died, and five others were injured. Area newspapers reported that the van had suffered a rollover after a tire had blown out. Defendant's Statement of Facts, app. B. In addition, the police report regarding the accident noted that "the rear tire was missing much of the steel belted tread," and the tire had experienced a laceration. Id., app. A, Police Report, at 1. The tire involved in the accident was a Steeltex tire, manufactured at the Decatur, Illinois plant of Defendant Firestone. Plaintiffs' Motion to Remand at 3. In 1997, the six other individuals in the accident, or their survivors, filed lawsuits against, among others, Firestone and Case, the seller of the tire, based on theories of negligence and strict liability. Id. Plaintiffs attest by affidavit that at all these times they were unaware of alleged defects in certain Firestone tires manufactured at the Decatur plant. P's Reply to Defendant's Response to Motion to Remand, exs. 1, 2. Arizona limits the initiation of wrongful death actions to two years from the date on which the action accrued. A.R.S. § 12-542. Plaintiffs did not file suit in the two-year period following the accident.

Beginning in September 2000, media outlets published information suggesting that tread separation caused by a defect played a role in the failure of certain Firestone tires. Plaintiffs' Motion to Remand at 4. On November 16, 2000, Plaintiffs filed a wrongful death action in Maricopa County Superior Court against Firestone and Case, an Arizona

limited liability company. On December 20, 2000, Defendants removed the matter to federal court, and on May 14, 2001, Plaintiffs filed this Motion to Remand.

Legal Analysis

Plaintiffs contend that this court lacks jurisdiction over the matter because there is not complete diversity among the parties. Defendants oppose Plaintiffs' Motion to Remand, arguing that Plaintiffs fraudulently joined Case as a co-defendant in this matter in order to defeat federal diversity jurisdiction. The law of the Seventh Circuit governs the removal and remand issues presented in this case. Halkett v. Bridgestone/Firestone, Inc., et al., 128 F. Supp. 2d 1198 (S.D. Ind. 2001). "[A]lthough a plaintiff is normally free to choose its own forum, it may not join an in-state defendant solely for the purpose of defeating federal diversity jurisdiction." Schwartz v. State Farm Mut. Auto. Ins. Co., 174 F.3d 875, 879 (7th Cir. 1999), citing Gottlieb v. Westin Hotel, 990 F.2d 323, 327 (7th Cir.1993). The joinder of nondiverse parties cannot defeat diversity jurisdiction if such joinder is fraudulent; parties fraudulently joined are disregarded. Gottlieb, 990 F.2d at 327. Because this Motion deals with allegations of fraudulent joinder, we look beyond the pleadings in applying the fraudulent joinder analysis. E.g., Schwartz, 174 F.3d at 879; LeBlang Motors, Ltd. v. Subaru of America, Inc., 148 F.3d 680, 690-91 (7th Cir. 1998); In re Bridgestone/Firestone Inc. Products Liability Litigation, 204 F. Supp. 2d 1149 (S.D. Ind. 2002); see also El Chico Restaurants, Inc. v. Aetna Cas. and Sur. Co., 980 F. Supp. 1474, 1479 (S.D. Ga. 1997) (citation omitted) (stating that, in evaluating allegations of fraudulent

joinder, a district court may "pierce the pleadings and consider the entire record, determining the question by any means available"); Williams v. Henson, 42 F. Supp. 2d 628, 631 n.7 (N.D. Miss. 1999).

"Fraudulent joinder occurs either when there is no possibility that a plaintiff can state a cause of action against nondiverse defendants in state court, or there has been an outright fraud in plaintiff's pleading of jurisdictional facts." Hoosier Energy Rural Elec. Co-op, Inc. v. Amoco Tax Leasing IV Corp., 34 F.3d 1310, 1315 (7th Cir. 1994), quoting Gottlieb, 990 F.2d at 327. The removing defendant bears the burden of establishing fraudulent joinder. Poulos v. Naas Foods, Inc., 959 F.2d 69, 73 (7th Cir. 1992). Most often, as in the instant case, "fraudulent joinder involves a claim against an in-state defendant that simply has no chance of success, whatever the plaintiff's motives." Id.; see also In re Bridgestone/Firestone Inc. Products Liability Litigation, 204 F. Supp. 2d 1149, 1152 (S.D. Ind. 2002).

Fraudulent joinder allegations, like the one at issue here, are not novel in the context of this Multidistrict Litigation, and we approach this particular dispute in a manner consistent with our previous decisions. We must determine whether, under Arizona law, Plaintiffs' action against Case (the non-diverse defendant) has any chance of success. Defendants contend, and bear the burden of establishing, that Plaintiffs have no possibility of recovery against Case because their claims are barred by Arizona's two-year statute of limitations for wrongful death actions. Plaintiffs counter that the applicable limitations

period should be tolled because Case and Firestone engaged in fraudulent concealment of their cause of action.

The determination whether Plaintiffs' action against Case is time-barred necessarily begins with determining when the action accrued. Arizona utilizes the "discovery rule" to determine the accrual date of a cause of action, such that "a plaintiff's cause of action does not accrue until the plaintiff knows or, in the exercise of reasonable diligence, should know the facts underlying the cause. Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of America, 898 P.2d 964, 966 (Ariz. 1995), citing 2 Calvin W. Corman, Limitations of Actions § 11.1.1 (1991). This rule applies with equal force to wrongful death actions, such as the instant case. Lawhon v. L.B.J. Institutional Supply Co., 765 P.2d 1003, 1005 (Ariz. Ct. App. 1988), citing Anson v. American Motors Corp., 747 P.2d 581 (Ariz. Ct. App. 1987). "'Pursuant to the discovery rule, a cause of action does not "accrue" until a plaintiff discovers or by the exercise of reasonable diligence should have discovered that he or she has been injured by the defendant's negligent conduct.'" Id., quoting Anson, 747 P.2d at 584. Indeed, "[t]he cause of action does not accrue until the plaintiff knows or should have known of both the what and who elements of causation," in other words, that he or she has been injured "by a particular defendant's negligent conduct." Id. at 1007. The point at which a plaintiff knew, or in the exercise of reasonable diligence should have known, that a particular defendant caused his or her injury is a question of fact that ordinarily must be decided by the jury. Anson, 747 P.2d at 588 (citation omitted); see also Gust, Rosenfeld &

Henderson, 898 P.2d at 969.

The facts of this case bear strong resemblance to Anson, an Arizona case in which the court applied the discovery rule to a wrongful death action. There, the Ansons' son died from injuries sustained in a rollover accident involving a Jeep CJ-7. The plaintiffs knew at the time of the accident that their son had lost control of the Jeep, that it had overturned, that the roll bar had collapsed, and that their son had died of massive head injuries. However, they alleged that they did not know at the time of the accident that the Jeep was defective in that it had an unreasonable propensity to overturn and its roll bar was structurally inadequate to protect the Jeep's occupants when a rollover occurred. The plaintiffs alleged that they did not learn of these defects, and, therefore, their claim did not accrue, until they saw a television program about problems with the Jeep more than a year after the accident. The court in Anson concluded that there were genuine issues of material fact on the issue of time of discovery," and that "the Ansons could not have initiated and conducted the research necessary to prove the causal link between the defects in the jeep and the death of their son." 747 P.2d at 586.

This case is also similar to Hannah v. General Motors Corp., 1994 WL 924259 (D. Ariz. 1994), involving an accident in which the fuel tank of a pick-up truck ruptured during a collision, killing two passengers and seriously injuring the driver. The defendant moved for summary judgment on statute of limitations grounds, and the court, applying Arizona law, including Anson, denied the motion, holding that the fact that the plaintiffs knew at the time

of the accident that the fuel tank ruptured, causing the fire that in turn fatally injured their sons, was not sufficient to trigger the statute of limitations. Rather, the court found that "[t]he principle [sic] 'facts' giving rise to this lawsuit are not the events of the accident itself, but rather the alleged defects in the fuel tank," and, therefore, "the statute of limitations began to run when plaintiffs knew, or through the exercise of reasonable diligence should have known, that a design defect in their pickup truck's fuel tank (allegedly) caused their injuries." Id. at *4. The plaintiffs presented evidence that they did not know of the alleged defects in the pick-up's fuel tank until a friend told them of a news program he had seen about the issue. The court also noted that the existence of other negligence lawsuits based on facts approximating those of the plaintiffs' case did not necessarily impact on plaintiffs' limitations period.

Moreover, our resolution of this issue is also guided by our earlier decision in Wilkinson, which involved a motion for summary judgment on statute of limitations grounds. In re Bridgestone/Firestone, Inc., 200 F. Supp. 2d 983 (S.D. Ind. 2002). There, the plaintiffs, parents of the victim of a fatal rollover accident involving a Ford Explorer and Firestone tires, argued that their wrongful death action based on the accident did not accrue until August 2000, when they first learned through media outlets that alleged defects in the tire and/or Explorer might have caused the accident. The plaintiffs provided evidence that they were unaware of any defect in the tire until they heard allegations of such defects on a television program. Their initial investigation at the time of the accident suggested

that their son's driving, not any defective tire, had caused his death. Applying Arizona law to these facts, we refused to conclude as a matter of law that the plaintiffs' investigation was inadequate and that in the exercise of reasonable diligence they should have discovered that the alleged defects caused their son's death. Instead, we denied the defendants' motion for summary judgment so that the issues of accrual and discovery could be decided by a jury.

The decisions in Anson, Hannah, and Wilkinson lead to the conclusion that a reasonable juror could find that Plaintiffs' cause of action in this case accrued after the March 1996 auto accident, possibly as late as September 2000. At the time of their son's accident, Plaintiffs knew only that a tire had blown out immediately before the rollover accident occurred. Plaintiffs attest by affidavit that they had no information, nor any reason to believe, that the tire failure resulted from any negligence on Firestone's part. The fact that the other passengers involved in this particular accident (or their survivors) filed suit against Firestone and Case within the limitations period, although relevant to the question whether Plaintiffs should have known about the alleged defects in the tire, does not by itself indisputably lead to such a conclusion.[1] Because a reasonable juror could find that

[1] In opposition to this Motion to Remand, Plaintiffs contend that Firestone and Case fraudulently concealed information regarding tire defects that precluded Plaintiffs from realizing their cause of action and bringing their claims within the applicable two-year statute of limitations, and, therefore, the statute should be tolled. Specifically, Plaintiffs allege that Firestone made affirmative misrepresentations in letters to the Arizona Game and Fish Department regarding tread separations uncovered in an investigation of certain Steeltex tires produced at the Firestone plant in Decatur, Illinois, and used on Arizona

Plaintiffs' cause of action did not accrue until September 2000, Defendants have not established as a matter of law that the suit was time-barred and, therefore, that the suit against Case has no chance of success. For this reason, Case will not be dismissed from this action, diversity of the parties is incomplete, and, therefore, federal subject matter jurisdiction is lacking. Accordingly, Plaintiffs' Motion to Remand is GRANTED and this case is remanded to the Arizona Superior Court of Maricopa County.

Conclusion

Game and Fish vehicles. This investigation allegedly resulted in Firestone "quietly agree[ing] to take back Firestone tires on Game and Fish vehicles and credit[ing] the State for the cost of those tires." P's Motion to Remand at 4. Plaintiffs further allege that Case knew of the investigation into alleged Firestone tire defects and the fact that certain tires were returned to Firestone for a refund.

We note that, under Arizona law, "[f]raud practiced to conceal a cause of action will prevent the running of the statute of limitations until its discovery." Walk v. Ring, 44 P.3d 990, 999 (Ariz. 2002), citing Acton v. Morrison, 155 P.2d 782, 784 (Ariz. 1945). Fraudulent concealment sufficient to toll the statute of limitations requires a positive act by the defendant taken for the purpose of preventing detection of the cause of action. Cooney v. Phoenix Newspapers, Inc., 770 P.2d 1185, 1187 (Ariz. Ct. App. 1989), citing Jackson v. American Credit Bureau, Inc., 531 P.2d 932 (Ariz. Ct. App. 1975). "There must be positive acts of concealment done to prevent detection. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry." Tovrea Land & Cattle Co. v. Linsenmeyer, 412 P.2d 47, 63 (Ariz. 1966), citing Guerin v. American Smelting & Refining Co., 28 Ariz. 160, 236 P. 684 (1925).

Despite alleging that Case engaged in fraudulent concealment, Plaintiffs do not allege that Case took any affirmative steps to prevent Plaintiffs from detecting their cause of action or engaged in any other conduct remotely resembling a "trick or contrivance." Absent such evidence, we cannot conclude as a matter of law that Case engaged in fraudulent concealment sufficient to toll the applicable statute of limitations. Ultimately, however, we need not decide whether Plaintiffs have adequately supported this defense in order to decide this Motion to Remand.

Plaintiffs filed a Motion to Remand, arguing that this court lacks federal diversity jurisdiction. Defendants opposed remand on the ground that Charlie Case Tire Company had been fraudulently joined as a defendant in order to defeat such jurisdiction. For the reasons set forth above, Plaintiffs' Motion to Remand is GRANTED and this cause is remanded to the Arizona Superior Court of Maricopa County.

It is so ORDERED this _____ day of July, 2002.

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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